1960

Mabel H. Wade v. Salt Lake City : Brief of Plaintiff and Appellant

Utah Supreme Court

Mark S. Miner; Attorney for Plaintiff and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

MABEL H. WADE,
Plaintiff and Appellant,

vs.

SALT LAKE CITY,
a Municipal Corporation,
Defendant and Respondent.

Case No. 9219

BRIEF OF PLAINTIFF AND APPELLANT

MARK S. MINER
Attorney for Plaintiff and Appellant
863 First Security Building
Salt Lake City, Utah

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF CONTENTS—Continued

TEXTS CITED

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STATEMENT OF FACTS

On April 8, 1959, at approximately 3:00 p.m., while the plaintiff was a business guest at the Salt Lake City Airport #1, and while she was using due and proper care and walking through the terminal building, said building being owned and operated by Salt Lake City, and having therein ticket offices for all major airline companies and it being the depot for all air passengers and freight, and while

said plaintiff was walking through the passageway from the ticket booth out to the airfield, she did slip and fall upon the floor which was then and there being maintained by Salt Lake City, said floor having upon it wax, soap, water and other substances which were not visible to the plaintiff or to any reasonable person under the circumstances, and the negligence of the defendant did cause the plaintiff to fall on the floor and, as a result of this negligence, she did receive a broken arm, severe bruises, contusions, a dislocated shoulder, head injuries, a complete prolapsis of her internal organs and severe shock.

The plaintiff, first complying with the necessary statutes on procedure, served due and proper notices upon the defendant city corporation and, at the expiration of a statutory time, commenced the suit herein. The defendant herein answered with the following motion:

> "Comes now the defendant and moves the court to dismiss the above-entitled case for the reason that said complaint fails to state a claim upon which r e l i e f can be granted."

This motion came on regularly for hearing before the Honorable Aldon J. Anderson, Judge, and Judge Anderson dismissed plaintiff's complaint With Prejudice on the ground that Salt Lake City, a Corporation, in operating the Salt Lake City airport,

is doing so as a governmental function.

From this ruling plaintiff appeals.

POINT AT ISSUE

There was only one question presented and argued under the defendant's motion to dismiss and there is only one question presented to this honorable court. That is, "IS SALT LAKE CITY HELD LIABLE FOR ITS NEGLIGENCE IN THE OPERATION OF THE MUNICIPAL AIRPORT OR IS SALT LAKE CITY GRANTED IMMUNITY FOR ITS TORTS BY REASON OF THE FACT THAT THE OPERATION OF THE SALT LAKE CITY AIRPORT IS A GOVERNMENTAL FUNCTION?"

ARGUMENT

It is the contention of the plaintiff herein that Salt Lake City, in the operation of the Salt Lake City airport, is engaged in not a governmental but a proprietary function and that the city cannot claim immunity by reason of its claim that it is engaged in a governmental function.

On this type of motion, plaintiff respectfully takes the position that all allegations set forth in plaintiff's complaint must be deemed to be true and that for the purpose of this motion, the negligence of the defendant Salt Lake City is deemed to be

admitted. Plaintiff takes the further position that for the purpose of this motion plaintiff was a business guest and the injuries and the damage resulting therefrom are admitted by the defendant.

It was conceded at the argument on defendant's motion that there is no statute in the State of Utah which grants immunity to Salt Lake City for its negligence in operating Salt Lake City airport. It is respectfully submitted that in the absence of such a statute, the general rule is that cities are liable for their negligence in their operation of municipal airports upon the ground that the ownership and operation of a municipal airport is a proprietary as opposed to a governmental function with regard to which the municipalities cannot claim immunity from tort liability.

(In this regard see 66 ALR 2nd., page 636).

It is further submitted that in the majority of the cases, municipalities have been held liable for the negligent operation of municipal airports on the ground that the ownership and operation of the airports are proprietary because the airports are analagous to other transportation facilities such as docks and wharves, bus terminals and railroad stations, the ownership and operation of which are held to be proprietary in character.

See *Mobile* vs. *Lartigue* (1930), 23 Alabama Appellate 479, 127 Southern 257; *San-*

ders vs. *Long Beach* (1942), 54 California Appellate 2nd. 651, 129 Pacific 2nd. 511; *Heitman* vs. *Lake City* (1947), 225 Minnesota 117, 30 Northwest 2nd. 18.

It cannot be denied that the operation of the Salt Lake City airport is of a revenue-producing character and as such places it squarely within the proprietary capacity. In this regard, see

Indamar Corp. vs. *Crandon* (1952 CA 5 Fla.) 196 Federal 2nd. 5, where the court held:

"Public airdrome proprietors are obligated to see that an airport is safe for aircraft or at least to use care to see what it is." It also held that the plaintiff had made a prima facie case for the jury and that therefore at the trial the court could not instruct a directed verdict.

See also *Peavey* vs. *Miami* (1941), 146 Florida 629, 1 Southern 2nd. 614, 12 NCAA NS 40, where the court, before discussing the question of the city's negligence, observed that where the municipality does not devote the airport exclusively to municipal or governmental purposes but "undertakes to conduct commercial enterprises from which it seeks to derive revenue", it is liable for its torts, "in respect thereto in the same manner and to the same extent that a private operator would be." The court went on to say, since "the record is silent as to the character of the use for which the airdrome was maintained, we shall assume that it was of a commercial nature . . ."

In this case, plaintiff was deprived of the right to show by live evidence that the operation of Salt Lake City airport is of a proprietary and commercial nature. This right was taken away from the plaintiff by the defendant's motion and the court's summary judgment on the matter. The court's attention is called to:

> *Caroway* vs. *Atlanta* (1952), 85 Georgia Appellate 792, 70 Southeast 2nd. 126, a case in which the court held that the city was liable for negligence in waxing the airport terminal floor and observed that when a city maintains such a terminal for a substantial profit and in competition with private business, it, too, must keep the premises in a safe condition and is liable for any injuries which result from its negligence in failing to keep the premises safe.

The court's attention is also respectfully called to:

> *Daniels* vs. *County of Allegheny* (1956 DC Pa.) 145 Federal Supplement 358, where one of the plaintiffs fell while walking along the passageway leading from the administration building to the parking lot at the Greater Pittsburg airport. After a jury trial, with the verdict returned in favor of the plaintiffs, the defendant county moved for a judgment, notwithstanding the verdict, on the ground that it was not liable for torts committed at the airport. The motion was denied. The evidence showed that the airport covered 1,600 acres, had an administration building including a 62-room hotel and nightclub, refresh-

ment stands, restaurants, gift shops, an amusement center and drug stores . . . The court said that no case cited by the county excused it from liability because it was an arm of the state government but that on the contrary, under Pennsylvania law, governmenal agencies when engaged in business enterprises, are liable for their torts. "Considering . . . the . . . county receives thousands of dollars annually from activities which cannot be considered within the realm of governmental function," concluded the court, "it would seem it would be an anomaly in the law to absolve defendant county from liability merely because it was an arm of the state government."

We submit that this is good law and should be adopted by the Utah Supreme Court.

The court's attention is called to the fact that textbook writers and authorities generally hold that in absence of waiver of immunity, liability of the municipality depends upon whether or not the city is engaged in a governmental or proprietary function. In this regard, the weight of authority holds the operation of an airport to be a proprietary function with consequent liability of the municipality for negligence.

See *Coleman* vs. *City of Oakland* (1930), 110 California Appellate 715, 295 Pacific 59; *Peavey* vs. *City of Miami* (1941), 146 Florida 629, 1 Southern 2nd. 614; *Wendler* vs. *City of Great Bend* (1957), 181 Kansas 753, 316 Pacific 2nd. 265; *Brummett* vs. *City of Jackson* (1951), 211 Mississippi 116, 51 Southern

2nd. 52; *City of Blackwell* vs. *Lee* (1936), 178 Oklahoma 338, 62 Pacific 2nd. 1219; *Mollencop* vs. *City of Salem* (1932), 139 Oregon 137, 8 Pacific 2nd. 783, 83 ALR 315; *Plewes* vs. *City of Lancaster* (1952), 171 Pa. Super 312, 90 Atlantic 2nd. 279.

The court will note that the above rule has been applied despite statutes declaring the operation or maintenance of an airport to be municipal or governmental in function. On the theory that this determination is exclusively for the courts, see:

Brasier vs. *Cribbett* (1958), 166 Nebraska 145, 88 Northwest 2nd. 235; *Granite Oil Securities* vs. *Douglas County* (1950), 67 Nevada 338, 219 Pacific 2nd. 191; *Rhodes* vs. *City of Asheville* (1949), 230 North Carolina 759, 53 Southeast 2nd. 313.

The court's attention is also called to the fact that municipalities are capable of waiving immunity from court liability by obtaining public liability insurance. In this case it cannot be denied that Salt Lake City is well covered by insurance and that the true parties in interest here are the insurance companies who are handling this appeal. In this regard, the court's attention is called to the case of:

Knoxville vs. *Bailey* (1955, CA 6, Tennessee) 222 Fed. 2nd. 520, where the court held that where a city obtains public liability insurance for the operation of its airport, it thereby waives its immunity from tort liability for such operation, to the extent of its insurance coverage. The court in this Ten-

nessee case so held in spite of a state statute which was invoked by the defendants which declared the construction, maintenance and operation of a municipal airport to be a governmental function and further provided that no suit could be brought against any municipality in or about the construction, maintenance, operation, superintendence or management of a municipal airport. (WE HAVE NO SUCH STATUTE IN UTAH AND THIS WAS CONCEDED AT THE ARGUMENT BEFORE JUDGE ANDERSON.) In this case the plaintiff fell while descending steps leading from the terminal building at the municipal airport and brought suit against the city on allegations that the color and construction of the steps and landings were such as to make it impossible for a person using the landings to differentiate between the various levels. After a jury trial, judgment was entered on the verdict against the city and affirmed an appeal. The court pointed out that by the terms of the judgment, it could be collected only from the city's insurance carrier. It cited state case law and held that the city had waived its statutory immunity by obtaining public liability insurance, to the limit of such coverage.

In view of the great weight of authority and in view of the cases cited, the plaintiff herein respectfully submits that since public utilities such as electric lights, gas, water, transportation systems, harbors, wharves and airfields are universally classed as proprietary, this court should have no hesitancy in deciding that the airport owned and

operated by the municipality of Salt Lake City is operated in a proprietary capacity.

Should the court look around the State of Utah, it is respectfully submitted that the great majority of the airfields in Utah are operated by individuals in a proprietary capacity and that the City of Salt Lake is in competition with them in a proprietary capacity and that the City should be liable to the same extent as an individual owning his own airfield.

The defendant herein certainly cannot deny that the city is operating the airfield in a proprietary capacity nor can it deny that the city receives great revenue from the activities. And under the cases it is not necessary to show that a profit was made but rather that the functions do not fall within the category which is essentially governmental in character. On the basis and rule of analogy to other functions, it cannot be denied by the defendant that the operation of an airfield is proprietary and commercial in nature and, with the passing of time, the Salt Lake City airport has surpassed the depots and/or the railroad stations here in Salt Lake City in the handling of traffic and freight and, where they are in competition in the transportation business, they certainly should not be able to claim they are operating in a governmental function any more than the railroads who are operating their depots here in the same city.

It is respectfully submitted that defendant's motion should be denied and that the plaintiff herein should be permitted to proceed in her action against the defendant Salt Lake City for the gross injuries received as the result of its negligence.

Respectfully submitted,

MARK S. MINER
Attorney for Plaintiff and Appellant

863 First Security Building
Salt Lake City, Utah